YUKILON MANUFACTURING SDN BHD & ANOR

v.

DATO' WONG GEK MENG & ORS (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-257-1996]
6 JUNE 1997

CIVIL PROCEDURE: *Action - Breach of trust - Notice of motion filed seeking leave to commence contempt proceedings - Rules of the High Court 1980, O. 52 r. 2(1) - Parties - Names of parties and title of action different from main suit - Whether requires order of Court - Rules of the High Court 1980, O. 15 - Pleadings - Defects in pleadings - Striking out*

CIVIL PROCEDURE: *Service - Change of solicitors - No Form 138 on notice of change filed - Whether service on solicitor on record good service - Rules of the High Court 1980, O. 64 r. 1(1) - Solicitor - Change of solicitor - Counsel appearing in Court - Discretion of Court to adjourn hearing to open Court - Rules of the High Court 1980, O. 32 r. 11(1) - Costs - Discretion of Court - Personal liability of solicitor - Solicitor, whether should be ordered to pay costs of application*

LEGAL PROFESSION: *Liability as officer of Court - Costs - Professional discipline - Legal Profession (Practice and Etiquette) Rules 1978, rr. 49 & 60A - Retainer - Change of solicitor - No Form 138 on notice of change filed - Whether has locus standi to appear - Whether service on solicitor on record good service*

The present action was instituted by the plaintiffs in 1996 against the defendants for breach of fiduciary duties and breach of trust by the 1st defendant as director and by the 2nd defendant as the general manager of the plaintiffs. The solicitors on record for the defendants were M/s Gana Muthusamy & Co. and the solicitors for the plaintiffs were M/s Gan & Lim.

On 5 May 1997 one Mr Mahalingam (from M/s PM Mahalingam & Co) filed an *ex parte* notice of motion in encl. 41 applying for leave to cite Mr Pathmanathan and Mr Gan Techiong (from M/s Gan & Lim) and one Sakamoto and one Makoto who were directors of the plaintiffs for contempt under O. 52 r. 2(1) of the Rules of the High Court 1980 ('the RHC').

The affidavit in support of encl. 41 made reference to a letter dated 27 March 1997 from M/s PM Mahalingam & Co which intimated a desire to file Court proceedings against the said Pathmanathan, Gan Techiong, Sakamoto and Makoto for damages in the tune of RM5 million for defamation unless they agreed to publish an apology in the New Straits Times. The subject matter of the defamation was a letter dated 7 December 1996 written by the said Sakamoto and Makoto to M/s Gan & Lim instructing the said law firm to apply for an anton piller order against the defendants in order to prevent the 1st and 2nd defendants from removing or destroying evidence pertaining to the said action. Enclosure 41 was fixed for hearing in open Court on 17 May 1997.

On 14 May 1997 M/s Gan & Lim filed a summons-in-chambers in encl. 44 praying, *inter alia*, that encl. 41 be struck out.

Mr Pathmanathan from M/s Gan & Lim argued that the title to the action could not be changed except by an order of the Court made under O. 15 of the RHC. He further submitted that the restructuring of the names of the parties in encl. 41 was unprecedented in the annals of legal history.

Enclosure 44 was served on M/s Gana Muthusamy & Co as the solicitors on record acting for the defendants. Mr R Jayabalan from M/s Gana Muthusamy & Co argued that encl. 44 should not have been served on them as they were not involved in the committal proceedings set out in encl. 41. However, he admitted that M/s Gana Muthusamy & Co were solicitors on record for the defendants in this civil suit.

Enclosure 44 was also served on Mr Mahalingam. Counsel contended that the said Mr Mahalingam should be made to personally bear the costs in reference to encl. 41. Enclosure 44 was fixed for hearing in chambers on 17 May 1997.

On 17 May 1997, encl. 41 came up for hearing in open Court. Mr Yusuf Khan who acted for the respondents/defendants in encl. 41 submitted that though encl. 44 was fixed for hearing in chambers on the same day, the Court could pursuant to O. 32 r. 11(1) of the RHC order that it be heard in open Court by reasons of its importance. He further submitted that encl. 44 should be heard in open Court before the hearing of encl. 41 because if encl. 44 was successful there would be no necessity to hear encl. 41. The hearing of encl. 41 and encl. 44 was adjourned to 30 and 31 May 1997.

On 23 May 1997 Mr Mahalingam filed an *ex parte* summons-in-chambers in encl. 50 seeking leave from the Court to change the title of the present suit from Civil Suit No: 22-257-1996 to Originating Motion No: _____ of 1997.

Enclosure 50 was fixed for hearing on 30 May 1997 in chambers. On 30 May 1997 in open Court, the issue again arose as to whether encl. 44 ought to be heard in open Court.

Held:

[1] Enclosure 50 was filed by Mr Mahalingam solely to pre-empt encl. 44. That was conduct unbecoming of a member of the bar. On encls. 41 and 44, it was a case of changing the character of one suit to that of another without an order of the Court. This was a classical case where the RHC was thrown to the wind. To overcome encl. 41 would be to strike it out *in limine*. The Court was not concerned at all as to how to rectify encl. 41. That would not be the domain of the Court. He who changes the character of the proceedings without an order of the Court must bear the brunt of judicial indignation. He who changes the character of the proceedings must do so at his own peril. Enclosure 41 had no place in these proceedings and it must be expunged or struck out forthwith.

[2] The language of O. 64 r. 1(1) of the RHC is quite clear and unambiguous. It states that the notice of change of solicitor in Form 138 must be filed in the Registry. Unless and until a notice of change of solicitors was filed and served in accordance with the said order, M/s Gana Muthusamy & Co shall remain on record as solicitors for the 1st defendant and the service of encl. 44 on them was good. Till the date of the hearing (ie, on 30 May 1997) Mr Mahalingam had yet to file Form 138 to show that he had taken over the affairs of the defendants from M/s Gana Muthusamy & Co. The mere filing of encl. 41 by a solicitor not properly on record would render it defective. The RHC sets out the perimeters of Court proceedings and all advocates and solicitors should bring themselves within the ambit and purview of it lest they fall from grace. A complete stranger to the action will never be accorded *locus standi*. To reject encl. 41 at this stage would mean to prevent abuse and it would also serve as a warning to other members of the bar not to interfere unless they followed strictly the rigours of the RHC. The words "until the final conclusion of the cause or matter" appearing in O. 64 r. 1(1) of the RHC would mean that until judgment has been worked out M/s Gana Muthusamy & Co, must remain on record as solicitors for the defendants.

[3] In plain and clear language, O. 32 r. 11(1) of the RHC gives the Court an unfettered discretion more in the nature of a *carte blanche* to decide whether encl. 44 should be heard in open Court by reason of its importance or for any other reason. It was certainly important to hear encl. 44 in open Court together with encl. 41 because encl. 44 was related to encl. 41. Moreover, both enclosures have been fixed for hearings on

the same day. It would be convenient to proceed to open Court to dispose both these two enclosures simultaneously. It is beyond peradventure that the discretion accorded in O. 32 r. 11(1) of the RHC must be exercised according to common sense and justice. It must be a judicial discretion and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet. This was a fit case for encl. 44 to be heard in open Court and an order to that effect was accordingly made. Enclosures 44 and 41 were also ordered to be heard simultaneously.

[4] The discretion to grant costs must be exercised judicially and according to the rules of reason and justice. It must not be motivated by private opinion nor benevolence nor sympathy. The discretion to grant costs must, by necessity, be justifiable. There were materials available in the present case for the Court to exercise that discretion in awarding costs to the successful party without having to hear fresh *viva voce* evidence for the purpose of determining costs. The rationale for ordering the solicitor to pay personally the costs incurred in the proceedings was not to punish the solicitor but to protect and compensate the opposite party.

[Order accordingly.]

Cases referred to:

Yukilon Manufacturing Sdn Bhd & Anor v. Dato' Wong Gek Meng & Ors [1997] 2 CLJ 467 ***(refd)***

Chan Sang & Anor v. Golden Century Development Sdn Bhd & Anor and other actions [1995] 1 CLJ 347 ***(refd)***

Lim Nyook Yin v. Ultratech Sdn Bhd & Anor [1995] 1 CLJ 215 ***(refd)***

Insas Bhd & Anor v. Ayer Molek Rubber Co Bhd & Ors [1995] 3 CLJ 328 ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin [1995] 2 CLJ 900 ***(refd)***

Hisham, Sobri & Kadir (suing as a firm) v. Lim Chau Seng Anor [1987] 2 MLJ 387 ***(refd)***

Attorney-General, Malaysia v. Manjeet Singh Dhillon [1991] 1 CLJ 216 ***(refd)***

Lady de la Pole v. Dick [1885] 29 Ch D 301 ***(cit)***

Callow v. Young [1886] 55 LT 543 ***(cit)***

Bagley v. Maple & Co [1911] 27 TLR 284 ***(cit)***

Malaysian International Merchant Bankers Ltd v. Highland Chocolate & Confectionary Sdn Bhd & Anor [1997] 1 CLJ 480 ***(refd)***

Hardie and Lane, Ltd v. Chiltern and Others [1927] 43 TLR 477 ***(cit)***

Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Bhd & Ors [1989] 2 MLJ 469 ***(refd)***

Sinnathamby & Anor v. Lee Chooi Ying, Brijkishore & Anor v. Lee Chooi Ying [1987] 1 MLJ 110 ***(refd)***

Lee v. Bude, etc., Ry [1871] LR 6 CP 576 ***(cit)***

Universal Cargo Carriers v. Citati [1957] 1 WLR 979 ***(cit)***

Annison v. District Auditor for St. Pancras BC [1962] 1 QB 489 ***(cit)***

Berry v. British Transport Commission [1962] 1 QB 306 ***(refd)***
Syarikat Joo Seng & Anor v. Habib Bank Ltd [1986] 2 MLJ 129 SC ***(refd)***
Malaysian Bar v. Tan Sri Dato Abdul Hamid Omar [1989] 2 MLJ 281 SC ***(refd)***
Sharpe v. Wakefield [1891] AC 173
Kierson v. Joseph L Thompson & Sons Ltd [1913] 1 KB 587 ***(cit)***
Bevington v. Perks [1925] 2 KB 231 ***(cit)***
Ritter v. Godfrey [1920] 2 KB 47 ***(cit)***
Civil Service Co-operative Society v. General Steam Navigation Co [1903] 2 KB 756 CA ***(cit)***
Mayor of Bristol v. GW Ry [1916] WN 47 ***(cit)***
Karpal Singh v. Atip bin Ali [1987] 1 MLJ 291 ***(refd)***
Edwards v. Edwards [1958] ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(2)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 49, 60A
Rules of the High Court 1980, O. 2 r. 1(1), O. 15, O. 18 r. 19, O. 29 r. 1(2B), O. 32 r. 11(1), O. 52 rr. 2(1), (2), 3(1), O. 59 r. 8(2)(b), O. 64 rr. 1(1), 1(2)
Penal Code, s. 408

For the plaintiffs in encl. 44 - Yusof Khan Ghows Khan (M Pathmanathan & Gan Techiong with him); M/s Gan & Lim
For the defendants in encl. 44 - R Jayabalan; M/s Gana Muthusamy & Co
For the applicants in encl. 41 & 50 - PM Mahalingam (not on record); M/s PM Mahalingam & Co (not on record)
For the respondents in encl. 41 - Yusof Khan Ghows Khan; M/s Gan & Lim

JUDGMENT

Abdul Malik Ishak J:

On 21 January 1997, Mr. Gana Muthusamy from Messrs Gana Muthusamy & Co., and assisted by Mr. Hardip Singh appeared for all the four defendants while the plaintiffs were represented by Mr. M. Pathmanathan and Mr. Gan Techiong from Messrs Gan & Lim. On that day Mr. Gana Muthusamy raised a preliminary objection which eventually was dismissed by me with costs. A written judgment on that preliminary objection had been written and circulated to all the parties. That written judgment has since been reported *vide Yukilon Manufacturing Sdn. Bhd. & Anor. v. Dato' Wong Gek Meng & Ors.* [1997] 2 CLJ 467; [1997] 2 MLJ 212. On receipt of the written judgment Mr. Gana Muthusamy filed a notice of appeal dated 22 March 1997 as reflected in Encl. 32. By letter dated 5 May 1997, Mr. Gana Muthusamy enclosed an undated notice of withdrawal of that appeal. That was a wise move.

On 5 May 1997, Mr. P.M. Mahalingam from Messrs P.M. Mahalingam & Co. filed an *ex-parte* notice of motion in Encl. 41 which bore the following title:

IN THE HIGH COURT OF MALAYA HOLDEN AT JOHOR BAHRU

CIVIL SUIT NO: 22-257-1996

BETWEEN

DATO WONG GEK MENG, JP ... APPLICANT/PLAINTIFF

AND

(1) PATHMANATHAN A/L MYLVAGANAM

(2) GAN TECHIONG

(3) M. SAKAMOTO

(4) MAKOTO TOGASE ... RESPONDENTS/DEFENDANTS

To put matters in perspective, it would be useful to set out the prayers sought for in Encl. 41. It was worded thus:

(a) bahawa pemohon/plaintif diberi kebenaran dari Mahkamah Yang Mulia ini suatu Perintah Penghakiman terhadap responden/defendan-defendan;

(b) kos permohonan ini dijadikan kos dalam kausa; dan

(c) relief atau perintah-perintah seterusnya yang Mahkamah Mulia ini fikir sesuai dan berpatutan.

In a nutshell, Encl. 41 was an application by Dato Wong Gek Meng JP, for leave to cite Pathmanathan a/l Mylvaganam, Gan Techiong, M. Sakamoto and Makoto Togase for contempt under O. 52 r. 2(1) of the Rules of the High Court, 1980 ('RHC'). The application in Encl. 41 was supported by a statement setting out the name and description of the applicant, the names, descriptions and addresses of the persons sought to be committed together with the grounds on which the committal was sought. It was also supported by an affidavit of Mr. P.M. Mahalingam verifying the facts relied upon. There was thus compliance of O. 52 r. 2(2) of the RHC.

In open Court, Mr. Gan Techiong submitted bluntly that they were not served with Encl. 41 but all the same they obtained it through the Court file after paying a praecipe of RM35.

It is interesting to note that the affidavit of Mr. P.M. Mahalingam in support of Encl. 41 made reference to a letter from Messrs P.M. Mahalingam & Co., dated 27 March 1997 marked as Exh. 'PM9'. That letter intimated a desire to file Court proceedings for damages in the tune of RM5million for defamation purportedly committed by Pathmanathan a/l Mylvaganam, Gan Techiong, M. Sakamoto and Makoto Togase unless they agree to publish an

apology in the New Straits Times in the form and manner to be approved by the solicitors of Dato Wong Gek Meng JP in order to mitigate the damages. Exhibit 'PM9' entitled *Publication Of Libellous Statements*, letter dated 7 December 1996 addressed to M/s Gan & Lim from Mr. M. Sakamoto and Mr. Makoto Togase" and this must be the letter that incurred the wrath of Dato Wong Gek Meng JP. The statement in support of Encl. 41 produced in verbatim the letter dated 7 December 1996 and to put matters in perspective that letter should be reproduced. That letter was worded in this way:

7 December 1996

M/s Gan & Lim,
Advocates & Solicitors,
61, Jalan Tan Hiok Nee,
80000 Johor Bahru,
Johor Malaysia.

Dear Sirs,

Re: Court proceedings against Dato Wong Gek Meng, Mr. Wong Geok Cheong and Supertex Mfg Sdn Bhd

We refer to our meetings about the above matter.

We understand that the one and only way to preserve evidence of breach of fiduciary duties and breach of trust against our director Dato Wong Gek Meng and General Manager Wong Geok Cheong is to apply for what your Mr. Gan Techiong called (an) Anton Piller order. If Dato Wong and his brother know about our application early, they would definitely move everything away, or even destroy evidence. So, it is very important that they must not know about the Court proceedings at this stage.

We confirm that our company must sue Dato Wong, Mr. Wong Geok Cheong and Supertex Mfg Sdn Bhd as soon as possible and for that purpose we appoint you as our solicitors.

Please proceed as soon as possible. Thank you.

Yours faithfully,

Sgd	Sgd
...	...
M. Sakamoto	Makoto Togase
Director	Director

Incidentally this very letter formed part and parcel of the judgment that was reported in the Current Law Journal (see p. 471 of the report) and the Malayan Law Journal (see pp. 217 and 218 of the report). Be that as it may, Encl. 41 was fixed for hearing in open Court on 17 May 1997.

On 14 May 1997, Messrs Gan & Lim filed a summons-in-chambers in Encl. 44 which bore the following title:

IN THE HIGH COURT OF MALAYA HOLDEN AT JOHOR BAHRU

CIVIL SUIT NO: 22-257-1996

BETWEEN

(1) YUKILON MANUFACTURING SDN BHD

(2) YUKIGAYA CHEMICAL INDUSTRY CO LTD .... PLAINTIFFS

AND

(1) DATO WONG GEK MENG

(2) WONG GEOK CHEONG

(3) SUPERTEX INDUSTRIES SDN BHD

(4) SUPERTEX MFG SDN BHD .... DEFENDANTS

Enclosure 44 was supported by a "Perakuan Segera" in Encl. 43 and it was worded thus:

> Kami, selaku peguamcara plaintif-plaintif dalam tindakan di atas dengan hormatnya mengesahkan bahawa permohonan plaintif-plaintif yang difailkan bersama Perakuan Segera ini harus didengar pada hari Sabtu 17hb Mei 1997 bersama dengan, atau sebelum pendengaran Usul (kandungan 41) kerana ia adalah untuk membatalkan Usul tersebut. Kami memohon agar permohonan plaintif-plaintif ditetapkan untuk pendengaran pada 17hb Mei 1997.
>
> Bertarikh pada 14hb Mei 1997
>
> sgd
>
> ...
> Peguamcara plaintif-plaintif

Enclosure 44 was also supported by an affidavit of Mr. Gan Techiong that was affirmed on 14 May 1997 and filed on the same date as can be seen in Encl. 45. Both Encls. 43 and 45 bore the same title as that of Encl. 44. It is germane to set out the prayers sought for in Encl. 44. They were worded thus:

> (a) the first defendant's application made by way of Motion (Encl. 41) dated 5 May 1997 for leave of Court to commence committal proceedings against the plaintiffs' Counsel M. Pathmanathan and Gan Techiong and two (2) of the first plaintiff's directors Mitsuhiko Sakamoto and Makoto Togase be struck out;

(b) the first defendant whether by himself, his solicitors, Counsel, agent or servant or howsoever be restrained from instituting any further or other legal proceedings against the plaintiffs' counsels Gan Techiong and M. Pathmanathan and the first plaintiffs' directors Mitsuhiko Sakamoto and Makoto Togase in connection with or related to these proceedings and/ or to the letter dated 7 December 1996 written by the first plaintiff to its solicitors Messrs. Gan & Lim which was signed by the said Mitsuhiko Sakamoto and Makoto Togase, save by leave of this Honourable Court;

(c) costs of this application on a full indemnity basis to be paid by the first defendant to the plaintiffs; and

(d) other relief or order deemed fit by this Honourable Court.

As requested Encl. 44 was fixed for hearing in chambers on 17 May 1997.

In open Court, Encl. 41 came up for hearing on 17 May 1997. Mr. M. Pathmanathan and Mr. Gan Techiong appeared for Yukilon Manufacturing Sdn. Bhd. and Yukigaya Chemical Industry Co. Ltd. whom Mr. M. Pathmanathan described as the real plaintiffs. Mr. M. Pathmanathan also informed the Court that the real defendants were Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd. It is apparent that Mr. M. Pathmanathan was referring to the parties named therein in Encl. 44. Mr. P.M. Mahalingam introduced himself in open Court as Counsel for Dato Wong Gek Meng JP in regard to Encl. 41. Mr. Yusof Khan bin Ghows Khan introduced himself in open Court as Counsel for all the respondents/defendants in Encl. 41, namely Pathmanathan a/l Mylvaganam, Gan Techiong, M. Sakamoto and Makoto Togase. Mr. Yusof Khan submitted that he was instructed to oppose the application in Encl. 41 by the respondents in Encl. 41 and also by the plaintiffs in Encl. 44. Mr. Yusof Khan further submitted that though Encl. 44 was fixed for hearing in chambers, I could order that it be heard in open Court by reason of its importance under O. 32 r. 11(1) of the RHC. Flowing from this it was submitted by Mr. Yusof Khan that Encl. 44 should be heard in open Court before the hearing of Encl. 41. Thus, if Encl. 44 was successful there was no necessity to hear Encl. 41. In response, Mr. P.M. Mahalingam submitted that Encl. 41 that was filed for hearing in open Court merely sought leave, a mandatory requirement under O. 52 r. 2(1) of the RHC. I am aware of the decision of Abdul Malek Ahmad J (now JCA) in *Chan Sang & Anor. v. Golden Century Development Sdn. Bhd. & Anor. and other actions* [1995] 1 MLJ 92 where his Lordship dissected O. 52 of the RHC and gave his learned views. The headnote of the report merits reproduction and for clarity it is now reproduced:

(2) An order of committal can only be made by a Judge of the High Court under O. 52 r. 1 and, as such, applications for leave under O. 52 r. 2(1) must be made to a Judge of the High Court as the word "Court" in O. 52 r. 2(1) must mean a Judge of the High Court. Furthermore, the word "motion" in O. 52 r. 3(1) clearly denotes that the application for leave must be made to a Judge of the High Court in open Court and not in chambers.

(3) Although O. 52 r. 2(2) states that applications for leave may be made to a Judge-in-chambers when the Court is in vacation, the word "Court" in O. 52 r. 2(2) does not include the registrar as it would be illogical to require applications for leave to be made to the Judge-in-chambers only during Court vacations while at other times, the applications may be made to the registrar.

(4) The application for leave under O. 52 should have been to a Judge in open Court when the High Court was in session or to a Judge-in-chambers if it was in vacation and not to the registrar-in-chambers as in this case. As the registrar had no jurisdiction to deal with the matter, the leave obtained could not be a "proceeding" under O. 2 r. 1(1) and was not a mere irregularity but a nullity.

His Lordship Abdul Malek Ahmad J (now JCA) in erudite terms said at p. 99 of the report:

On these considerations, I can only conclude that the application for leave under the Order had been wrongly made as it should have been to a Judge in open Court when the High Court was in session or to a Judge-in-Chambers if it is in vacation and not to the registrar-in-chambers as what had happened in this case. To my mind, the application for leave is the root of the committal proceedings and any non-compliance of the procedure prescribed cannot merely amount to an irregularity but it would actually nullify the proceedings.

My attention was drawn to the case of *Lim Nyook Yin v. Ultratech Sdn. Bhd. & Anor*. [1995] 1 MLJ 498 which construed O. 29 r. 1 (2B) of the RHC and by necessity has no relevance to the application for leave under O. 52 r. 2(1) of the RHC. There I said (see p. 502 of the report):

In my judgment, time is mandatorily set out in O. 29 r. 1(2B) of the RHC and the Court has no power to extend time. Thus, an interim injunction granted *ex parte* would lapse after two weeks in the absence of any application to revoke it or to set it aside (*Tan Kim Seng v. Tan Kim San* [1994) 3 CLJ 671). It is quite obvious that O. 29 r. 1(2B) of the RHC is inserted to curtail the lifespan of an *ex parte* interim injunction.

Reverting back to the mainstream of the case, I had to show to both Mr. M. Pathmanathan and Mr. Gan Techiong a letter written by Mr. P.M. Mahalingam using the letter head of the law firm of Messrs P.M. Mahalingam & Co. That letter was dated 8 May 1997 and it alleged misdeeds by one of the Senior Assistant Registrars of the High Court, Johor Bahru. I do not propose to go into the merits of that letter except to say that it was unsavoury. It was written

in bad taste. It reflected the uncouth behaviour of the writer. Totally uncultured. The tenor of that letter sought to undermine the administration of justice and I enquired of Mr. P.M. Mahalingam, Mr. M. Pathmanathan and Mr. Gan Techiong whether I should proceed to hear Encls. 41 and 44. I adjourned the case for a short while to enable Mr. M. Pathmanathan and Mr. Gan Techiong to read the letter dated 8 May 1997 which I handed to them in open Court. On resumption, Mr. M. Pathmanathan after returning the letter dated 8 May 1997 to me proceeded to address the Court and briefly this was what he said:

> We have sight of the letter dated 8 May 1997 the contents of which are shocking. It is trite that aggrieved parties have recourse as provided under the law and the rules of the Court. It is not a procedure to send a written complaint of this nature ... . Every judicial officer in this country however low in the hierarchy possesses independent powers and he cannot be directed even by his superiors on how to decide in a given matter. It is abundantly clear that the first defendant (referring to Dato Wong Gek Meng) is trying to deter and frighten us from continuing to discharge our duties. We thought we were the only ones whom the first defendant (referring to Dato Wong Gek Meng) is trying to deter, this letter shows that they are taking a step further to deter a judicial officer ... . We know that any decision made by a judicial officer is privileged and everything that transpires in the course of judicial proceeding is privileged primarily to protect judicial officers of the Court from discharging their duties without fear. ... It is not for the parties when the going are extraneous to take steps to instigate YA to disqualify yourself.

For my part, I have nothing useful to add to what Mr. M. Pathmanathan had said in regard to the letter dated 8 May 1997. I am reminded of the case of *Insas Bhd. & Anor. v. Ayer Molek Rubber Co. Bhd. & Ors.* [1995] 2 MLJ 833 where Eusoff Chin (Chief Justice) succinctly observed:

> It is judicially recognised that judicial pronouncements should be judicial in nature and not depart from sobriety, moderation, and reserve. It has been said elsewhere that the pen of a Judge should be like the knife of a surgeon which probes into the flesh only as much as is absolutely necessary for the purpose of the case before it. A Judge should neither reward virtue nor chastise vice, and his judgment should not display emotion and intemperance as displayed in the judgment of the Court of Appeal here.

In another part of the judgment, his Lordship Eusoff Chin (Chief Justice) continued in serious vein:

> Judges and magistrates must not only act neutral and fair, but be seen to act so. They should not jump into the arena and do battles with the parties, lest they may be blinded by the dust of the battle.

Finally, his Lordship Eusoff Chin (Chief Justice) gave this piece of advice:

> We wish to remind Judges and magistrates that where they find that an advocate handling any matter before them has grossly abused the process of Court or acted in a highly unethical manner, the proper step to be taken is for them to lodge a report with the Legal Profession Disciplinary Board established under s. 99(2) of the Legal Profession Act 1976, which will investigate the complaint and where both the accuser and the accused will be given a fair opportunity to state their cases.

By way of a *per incuriam*, Gopal Sri Ram JCA in *Hock Hua Bank (Sabah) Bhd. v. Yong Liuk Thin* [1995] 2 MLJ 213 had this to say in regard to an allegation of bias against a Judge:

> In my judgment, it is a most serious matter to allege bias against a Judge whose sole function is to decide a case according to the evidence before him. I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is capable of eroding public confidence in the judicial arm of the State than unwarranted and unfounded allegations of bias. It is therefore to be avoided at all costs if necessary, by having resort to the power to punish for contempt.

Mr. M. Pathmanathan submitted that both he and Mr. Gan Techiong have full confidence that I should continue hearing the case. Mr. P.M. Mahalingam echoed the same sentiments and this was what he said:

> I now say that I certainly have faith and confidence in YA to hear the case. I prefer YA to continue hearing the case. I have full confidence in YA.

It is interesting to note that Mr. R. Jayabalan from Messrs Gana Muthusamy & Co., admitted that on record Messrs Gana Muthusamy & Co. were the solicitors for the defendants in Civil Suit No: 22-257-96 and by this he meant Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd. Mr. R. Jayabalan was bold enough to assert that Messrs Gan & Lim served Encl. 44 to Messrs Gana Muthusamy & Co., even though the latter was not involved in the committal proceedings. It was Mr. R. Jayabalan's stand that Encl. 44 should not have been served on Messrs Gana Muthusamy & Co. Mr. M. Pathmanathan retorted that they had to serve Encl. 44 to Messrs Gana Muthusamy & Co., because the latter were the solicitors on record. Mr. Yusof Khan submitted that Encl. 44 was served on Mr. P.M. Mahalingam because they proposed to apply that costs be personally borne by Mr. P.M. Mahalingam in reference to Encl. 41.

Mr. P.M. Mahalingam referred to the letter dated 8 May 1997 and he sought to justify it. He said that that letter, in chronological order, set out the sequence of events. I do not propose, at this juncture, to harp on that letter and I now

proceed to the other points addressed by Mr. P.M. Mahalingam. I need to emphasise that at no point of time did Mr. P.M. Mahalingam deny writing that infamous letter dated 8 May 1997. The irresistible inference to be arrived at was that that letter dated 8 May 1997 was authored by Mr. P.M. Mahalingam. Be that as it may, no amount of denial, if any, could exculpate Mr. P.M. Mahalingam's authorship of the letter dated 8 May 1997.

In regard to Encl. 41, Mr. P.M. Mahalingam argued that it should have been renumbered. By this he must have meant that Encl. 41 should not be numbered as it were, namely, Civil Suit No: 22-257-1996. He submitted that Encl. 41 should be heard forthwith and that the opposing parties have no right to be heard until this Court gave leave in regard to Encl. 41. It was Mr. P.M. Mahalingam's submission that the opposing parties acknowledged his role as solicitor and Counsel for the defamation suit since all the defamation papers were served on him. Mr. P.M. Mahalingam admitted that Encl. 44 was served on him and that Messrs Gana Muthusamy & Co. were not involved in the defamation case. Reliance was placed on the case of *Hisham, Sobri & Kadir (suing as a firm) v. Lim Chau Seng & Anor.* [1987] 2 MLJ 387 where the contempt proceedings went by way of an originating motion and not by way of the original civil suit number yet it received the judicial approval of Mohamed Dzaiddin J (now FCJ). This was what his Lordship said:

> Finally, there was a third objection raised by Mr. Annamalai where he submitted that based on the true construction of O. 52 r. 1(2)(a)(ii) Rules of the High Court, this application ought to have been heard by the High Court which granted the injunction order ie, Court No. 1. Counsel also submitted that the contempt proceeding should have been commenced in the same Civil Suit No: 428 of 1986 and not by a separate originating motion. Without wasting much time, in my opinion, there is no merit in his objection because we are all fully aware that this Court is a Court of competent jurisdiction and is empowered to try and punish any contempt of itself under s. 13(2) of the Courts of Judicature Act 1964.

As I understood Mr. P.M. Mahalingam it was because of the case of *Hisham, Sobri & Kadir (suing as a firm) v. Lim Chau Seng & Anor. (supra)* that he proceeded to use the same civil suit number for Encl. 41 and that was No: 22-257-1996. Accordingly, he submitted that this Court was empowered to hear Encl. 41 and grant the leave that was sought for. By way of an analogy reference was also made to *Attorney-General, Malaysia v. Manjeet Singh Dhillon* [1991] 1 MLJ 167 SC, where the Attorney-General applied by way of a civil application no: 08-26-1989 to commit the respondent there to prison for alleged contempt of Court. With respect, the mode of filing was not in dispute in the case of *Attorney-General, Malaysia v. Manjeet Singh Dhillon (supra)* as was the case in the present proceedings. Next, Mr. P.M. Mahalingam argued that the service of Encl. 44 falls short of the clear two

days and when it dawned on him that he had to submit on the implications of O. 32 r. 11(1) of the RHC he swiftly applied for an adjournment. He relented and urged this Court to grant an adjournment for submissions in regard to Encls. 41 and 44.

Mr. Yusof Khan replied and he took exception to what Mr. P.M. Mahalingam said in regard to the question of service of Encl. 44. A strenuous argument was launched by Mr. Yusof Khan and it was his stand that Encl. 44 was rightly served on Messrs Gana Muthusamy & Co., who were the solicitors on record for Dato Wong Gek Meng as it was the latter who instituted the committal proceedings. An argument was advanced to the effect that the committal proceedings were grounded on a wrong footing and it was for this reason that the parties were before this Court *vide* Encl. 44 to have Encl. 41 struck out forthwith. Mr. Yusof Khan argued that it was not open for Mr. R. Jayabalan to disclaim having anything to do with Encl. 41 because Messrs Gana Muthusamy & Co., were the solicitors on record and they must necessarily be served with Encl. 44 and that service was effected on 14 May 1997. In so far as the service of Encl. 44 on Mr. P.M. Mahalingam was concerned, it was submitted by Mr. Yusof Khan that that service was meant to move this Honourable Court to order Mr. P.M. Mahalingam personally liable to bear the costs in reference to Encl. 41 as Mr. P.M. Mahalingam obviously had no standing at all. Mr. Yusof Khan puts it rather well when he submitted that this Court should hear Encl. 44 first because that would nail the coffin of Encl. 41 and bury it forever.

Mr. M. Pathmanathan argued that both he and Mr. Gan Techiong took Encl. 41 seriously. He said as officers of the Court the granting of leave for them to be condemned for contempt would be a most shameful act. He proceeded to argue that the mere granting of leave would give rise to this kind of implication. My attention was drawn to Encl. 45 and that enclosure makes for interesting reading. It was deposed in Encl. 45 that Dato Wong Gek Meng had on 9 April 1997 filed a civil suit claiming, *inter alia*, RM5 million damages against Mr. M. Pathmanathan, Mr. Gan Techiong, Mitsuhiko Sakamoto and Makoto Togase *vide* Johor Bahru High Court Civil Suit No: 22-79-1997. The application to strike out Dato Wong Gek Meng's action under O. 18 r. 19 of the RHC by the aggrieved parties have since been filed. What is distressing is the averment in Encl. 45 that Mr. P.M. Mahalingam had caused parts of the statement of claim in Civil Suit No: 22-79-1997 to be published in the New Straits Times on 13 April 1997. It was reported that Mr. P.M. Mahalingam spoke directly to the press and the New Straits Times report as exhibited in "GT5" bore out this fact. The New Straits Times report bore the caption: "Businessman files suit for RM5 million compensation" and for convenience certain passages as reported would now be reproduced:

> A businessman is suing two lawyers and two Japanese factory directors asking for compensation amounting to RM5 million over alleged libellous contents of a letter.

The letter referred to therein was none other than the letter dated 7 December 1996 which was reproduced in the early part of this judgment. The New Straits Times report further carried this story:

> Subsequently, a letter purported to have been written in January by the two lawyers, who represented Sakamoto and Togase, stated that Wong and Gek Cheong 'would definitely remove everything away or even destroy evidence ... so, it is very important that they must not know about the Court proceedings, at this stage'.

The last two paragraphs of the New Straits Times report carried this legend:

> Mahalingam said the words in the letter had painted a bad picture about Wong and his brother. He said the words implied that the plaintiff was of ill-repute, poor character, a liar, untrustworthy, behaved like a criminal and would even go to the extent of destroying documents.

What Mr. P.M. Mahalingam did was said to run counter to rr. 49 and 60A of the Legal Profession (Practice and Etiquette) Rules 1978. It was deposed that what Dato Wong Gek Meng and Mr. P.M. Mahalingam did were entirely motivated by malice and spite and the crave for publicity were meant to put Mr. M. Pathmanathan, Mr. Gan Techiong, Mitsuhiko Sakamoto and Makoto Togase in bad light and damage to their reputation especially the professional capacity of the two lawyers. It was deposed further that the real purpose of embarking on this course of conduct was not to serve the ends of justice but rather actuated by Dato Wong Gek Meng's deep seated malice and viciousness and possibly to try to avenge Wong Geok Cheong who was charged by the police under s. 408 of the Penal Code on 10 April 1997 for criminal breach of trust.

Mr. M. Pathmanathan strenuously argued that in the event Encl. 41 was allowed it would cause irreparable damage. It was his argument, quite rightly, that until and unless a notice of change of solicitors was filed and served in accordance with O. 64 r. 1(1) of the RHC, Messrs Gana Muthusamy & Co., shall remain on record as solicitors for Dato Wong Gek Meng. The fact that Encl. 41 was filed by Mr. P.M. Mahalingam did not *per se* give him *locus standi.* Order 64 r. 1(1) of the RHC reads thus:

> A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and served in accordance with this rule, the former solicitor shall, subject to rr. 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court.

and the language employed therein is quite clear and unambiguous. It means this. So long as Messrs Gana Muthusamy & Co., remains as the solicitor on record, the service of Encl. 44 on that solicitor is said to be good service. Cases like *Lady de la Pole v. Dick* [1885] 29 Ch. D 301; and *Callow v. Young* [1886] 55 LT 543 all establish the same principle and that is this: service on the solicitor on record is considered good service. In the present case there was no change of solicitors effected by Messrs P.M. Mahalingam & Co., in place of Messrs Gana Muthusamy & Co., when Encl. 41 was filed. Thus, the words "until the final conclusion of the cause or matter" appearing in O. 64 r. 1(1) of the RHC would mean that until judgment has been worked out Messrs Gana Muthusamy & Co., must remain on record as solicitors for Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd. (*Bagley v. Maple & Co.* [1911] 27 TLR 284; and *Lady de la Pole v. Dick (supra)*). I did say in *Malaysian International Merchant Bankers Ltd v. Highland Chocolate & Confectionery Sdn. Bhd. & Anor*. [1997] 1 MLJ 102; [1997] 1 CLJ 480 that:

> ... the RHC has the force of law and it should not be ignored or overlooked. The observance of the RHC is therefore of considerable importance in litigation and it is the mark of a skilful and experienced lawyer to know how best to employ the rules for the practical and tactical advantage of his client. The general purpose of the rules as exemplified in the RHC is to assist the parties in achieving justice and they are not meant, as some lawyers thought, to be the mechanism for disciplining either the parties or their solicitors.

It was a correct assertion by Mr. M. Pathmanathan when he submitted that Mr. P.M. Mahalingam had restructured the title to the action as reflected in Encl. 41 without an order of the Court. The names of the parties in Encl. 41 were entirely changed, different from that of Encl. 44. Be that as it may, Mr. P.M.Mahalingam prayed for an adjournment as he wanted to do research in regard to O. 32 r. 11(1) especially on the point as to whether Encl. 44 to be heard in open Court. An adjournment was duly granted and the hearings for Encls. 41 and 44 were scheduled on 30 and 31 May 1997.

On 23 May 1997, Mr. P.M. Mahalingam filed an *ex parte* summons-in-chambers in Encl. 50 supported by an affidavit affirmed by Mr. P.M. Mahalingam on the same day as reflected in Encl. 49. The title of Encl. 50 was worded thus:

NO: GUAMAN SIVIL : 22-257 TAHUN 1996

(USUL PEMULA NO: _____ TAHUN 1997)

ANTARA

DATO' WONG GEK MENG ... PLAINTIF/PEMOHON

DAN

(1) PATHMANATHAN A/L MYLVAGANAM

(2) GAN TECHIONG

(3) M. SAKAMOTO

(4) MAKOTO TOGASE ... DEFENDAN-DEFENDAN/ RESPONDEN-RESPONDEN

Enclosure 50 sought for the following prayer:

> (a) Untuk kebenaran dari Mahkamah untuk mengubah/mengganti tajuk kes ini dari Guaman Sivil No: 22-257-1996 kepada Usul Pemula No: ____ Tahun 1997

and it was fixed for hearing on 30 May 1997 in chambers.

On 30 May 1997, in open Court, Mr. Jayabalan from Messrs Gana Muthusamy & Co., stressed that his presence was due to the fact that Encl. 44 was served on them. Again Mr. Jayabalan stressed that Messrs Gana Muthusamy & Co., represented the defendants in Civil Suit No: 22-257-1996, namely Dato' Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd. – and nothing else. Mr. P.M. Mahalingam introduced himself as Counsel for Encls. 50 and 41; he too said he was present for Encl. 44. Upon hearing the existence of Encl. 50 scheduled for hearing in chambers on that day (30 May 1997), Mr. Yusof Khan remarked that **"we have no inkling of Encl. 50, surreptitiously filed, which was filed without our knowledge."** Mr. Yusof Khan further said that Encl. 41 was Mr. P.M. Mahalingam's application – a stranger to the cause. Mr. M. Pathmanathan submitted that Encl. 44 was his application and he would confine himself to prayers (a) and (c) thereof.

On the question of whether Encl. 44 ought to be heard in open Court the parties seemed to agree that the discretion was entirely mine to make. Order 32 r. 11(1) of the RHC states that:

> The Judge in Chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.

In plain and clear language O. 32 r. 11(1) of the RHC gives me an unfettered discretion more in the nature of a *carte blanche* to decide whether Encl. 44 shall be heard in open Court by reason of its importance or for any other reason. It is certainly important to hear Encl. 44 in open Court together with

Encl. 41 because Encl. 44 is related to Encl. 41. Moreover both enclosures have been fixed for hearings on the same day. It is convenient to proceed to open Court to dispose both these two enclosures (Encls. 44 and 41) simultaneously. But once Encl. 44 is adjourned to the open Court it is said that *"the matter is in Court for all purposes and is open to the press"* (*Hardie and Lane, Ltd. v. Chiltern and Others* [1927] 43 TLR 477). *Canopee Investment Pte. Ltd. & Ors. v. Landmarks Holdings Bhd. & Ors.* [1989] 2 MLJ 469 concerned an oral application for the matter to be adjourned from open Court back into chambers. This was what Shankar J (now JCA) said in that case:

> This is probably why O. 32 r. 11 is open-ended. It enables the Court to decide what is to be done in the interests of justice in each case.

In *Sinnathamby & Anor. v. Lee Chooi Ying, Brijkishore & Anor. v. Lee Chooi Ying* [1987] 1 MLJ 110 the then Supreme Court took cognisance of the fact that the trial Judge directed the respondent's summons-in-chambers to be heard in open Court under O. 32 r. 11(1) of the RHC and the order as extracted showed that it was an order pronounced in open Court. Since it was an order in open Court, Mohamed Azmi SCJ held the view that for the purpose of bringing an appeal the requirements of s. 68(2) of the Courts of Judicature Act which was in relation to an order made in chambers need not be complied with. It is pertinent to note that the trial Judge's discretion to order the summons-in-chambers to be heard in open Court was not questioned at all.

It is beyond peradventure that the discretion accorded in O. 32 r. 11(1) of the RHC must be exercised according to common sense and justice. It must be a judicial discretion "and not the mere whim or caprice of the person to whom it is entrusted on the assumption that he is discreet" (*Lee v. Bude, etc., Ry* [1871] LR 6 CP 576 at p. 580 per Willes J). It is also of great interest to read *Universal Cargo Carriers v. Citati* [1957] 1 WLR 979; and *Annison v. District Auditor for St. Pancras B.C.* [1962] 1 QB 489. Perhaps it is not out of place to cite the sage words of Devlin LJ in *Berry v. British Transport Commission* [1962] 1 QB 306 especially at p. 326 to the following effect:

> The Court has no power of its own motion to declare how the discretion conferred by a statute shall be exercised or to lay down rules about it. It derives its power from the statute itself according to the construction which it puts upon it – 'construction' being a word that embraces not only the interpretation of the words used but also the ascertainment of the true intent of the statute, considered in relation to the branch of the law with which it is dealing .... It is the intent of every statute which confers a discretionary power that the power should be used justly.

In my judgment, this is a fit case for Encl. 44 to be heard in open Court and an order to that effect was accordingly made. Having made that ruling, I ordered Encls. 44 and 41 to be heard simultaneously. This prompted Mr. P.M. Mahalingam to say that he wanted Encl. 50 to be heard in chambers first. In rebuttal, Mr. M. Pathmanathan submitted that it was not fair to his clients as Encl. 50 was filed surreptitiously. He submitted, and I wholeheartedly agree, that Encl. 50 was solely meant to pre-empt Encl. 44 especially prayer (a) thereof. He submitted that Mr. Jayabalan from Messrs Gana Muthusamy & Co., the solicitors on record for Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd., did say that they were not involved in Encls. 41 and 50. Incidentally, Mr. Jayabalan confirmed this and this prompted Mr. M. Pathmanathan to submit that Mr. P.M. Mahalingam from Messrs P.M. Mahalingam & Co., were not solicitors on record notwithstanding the fact that Encls. 41 and 50 were filed by them.

It is obvious that when Mr. P.M. Mahalingam filed Encl. 50 on 23 May 1997 it was done as an afterthought. When this Court heard submissions in regard to Encls. 44 and 41 on 17 May 1997 which finally was adjourned to 30 and 31 May 1997, Mr. P.M. Mahalingam realised the importance of prayer (a) to Encl. 44. Precisely put, Mr. P.M. Mahalingam knew that prayer (a) of Encl. 44 would extinguish and put an end to Encl. 41 forever. To circumvent it, Mr. P.M. Mahalingam filed Encl. 50 solely to pre-empt Encl. 44. To me that was a conduct unbecoming of a member of the bar. I do not propose to say anything more. I then proceeded to hear submissions in open Court for Encls. 44 and 41 simultaneously.

Mr. M. Pathmanathan argued that the title to the action as reflected in Encl. 44 remained and cannot be changed except by an order of this Court and made under O. 15 of the RHC. He submitted that the title of the action comprised the name of the High Court, the number of the action, the parties to the action being Yukilon Manufacturing Sdn. Bhd. and Yukigaya Chemical Industry Co. Ltd. as the plaintiffs and the defendants being Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd. He then referred me to Encl. 41 and he submitted that the name of the Court remained the High Court Johor Bahru, the suit number remained the same but the parties have changed. The first defendant in Encl. 44 became the plaintiff in Encl. 41. He wondered, rightly so, whether the Dato Wong Gek Meng JP in Encl. 41 was the same individual named as the first defendant in Encl. 44 because of the usage of the initial "JP". He submitted that Dato Wong Gek Meng JP had usurped the original plaintiffs in Encl. 44. He submitted that in Encl. 41 he found himself together with Gan Techiong, M. Sakamoto and Makoto Togase as defendants. He submitted with vigour and vitality that

restructuring the names of the parties was unprecedented in the annals of legal history. He rightly submitted that Court proceedings are governed by the RHC and the players must play within the rules. This was not offside but rather outside the rules, so submitted Mr. M. Pathmanathan.

I was referred to the case of *Syarikat Joo Seng & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 129 SC where there was a failure to apply to the Court or a Judge for leave to enter judgment against the appellants. That failure caused the judgment to be an irregular judgment obtained in direct contravention of the RHC. The appellants were therefore entitled *ex debito justitiae* to have the default judgment set aside. On the facts *Syarikat Joo Seng & Anor. (supra)* are poles apart and cannot be on all fours with the present case. The mistake in that case was not as glaring as the present case. The facts in the present are indeed peculiar and certainly far more serious than *Syarikat Joo Seng & Anor. (supra)*. It is apparent that Mr. P.M. Mahalingam has distorted the whole action and changed the status of the parties without an order of Court. That was quite blatant and without such leave Encl. 41 was filed. That was wrong.

This was a case of changing the character of one suit to that of another without an order of the Court. This was a classical case where the RHC was thrown to the wind. To overcome Encl. 41 would be to strike it out *in limine*. The Court was not concerned at all as to how to rectify Encl. 41. That would not be the domain of the Court. I am to say that he who changes the character of the proceedings without an order of the Court must bear the brunt of judicial indignation. He who changes the character of the proceedings must do so at his own peril. In my judgment, Encl. 41 has no place in these proceedings and it must be expunged or struck out forthwith. On record Messrs Gana Muthusamy & Co., remained as solicitors for the defendants in Encl. 44 and their representative categorically disclaimed connection with Encls. 41 and 50. The plaintiffs in Encl. 44 recognised Messrs Gana Muthusamy & Co., as the solicitors on record and it was for that reason that Encl. 44 was served on them.

Mr. M. Pathmanathan reiterated the significance of O. 64 r. 1(1) of the RHC. It was his submission that the language employed in the said order was so plain that no authority was required to support it. Order 64 r. 1(2) of the RHC states that the notice of a change of solicitor in Form 138 must be filed in the Registry. Till the date of the hearing (30 May 1997), Messrs Gana Muthusamy & Co., remained as solicitors for Dato Wong Gek Meng, Wong Geok Cheong, Supertex Industries Sdn. Bhd. and Supertex Mfg Sdn. Bhd. Mr. P.M. Mahalingam has yet to file Form 138 to show to this Court that he has taken over the affairs of the defendants in Encl. 44 from Messrs Gana Muthusamy & Co. The failure to file Form 138 by Mr. P.M. Mahalingam

prompted Mr. M. Pathmanathan to comment, perhaps somewhat injudiciously to the following effect. Who is Messrs P.M. Mahalingam & Co., who intrudes into this action? It would be incongruous, unsuitable, inappropriate and absurd for Messrs Gan & Lim to serve all the documents on Messrs P.M. Mahalingam & Co., who were not on record as the solicitors for the first defendant in Encl. 44. Without filing Form 138, Messrs P.M. Mahalingam & Co., acted without *locus standi* and had no standing at all in these proceedings. **Indeed in these circumstances it would be inappropriate to allow Mr. P.M. Mahalingam to submit before this Court.** Nevertheless, in the interest of justice I allowed Mr. P.M. Mahalingam to address the Court. Enclosure 41 which restructured the title to the action went to the root of the matter and it should rightly be struck down as a nullity. I venture to say that the mere filing of Encl. 41 by a solicitor not properly on record would render it defective. The RHC sets out the perimeters of Court proceedings and all advocates and solicitors should bring themselves within the ambit and purview of it lest they fall from grace. A complete stranger to the action will never be accorded *locus standi.* A busybody who interferes in these proceedings too will not be accorded right of hearing. To reject Encl. 41 at this stage would mean to prevent abuse by busybodies, cranks and other mischief – makers and it would also serve as a warning to other members of the bar not to interfere unless they follow strictly the rigours of the RHC. Always mindful of the full import and purport of the case of *Insas Bhd. & Anor. v. Ayer Molek Rubber Co. Bhd. & Ors. (supra),* judicial temperament of the highest order was exercised and, consequently, I did not let my indignation at the conduct of Mr. P.M. Mahalingam in restructuring Encl. 41 carry me away. I decided only on the facts and nothing else.

An argument was advanced that the procedure adopted in Encl. 41 followed closely that of *Attorney-General, Malaysia v. Manjeet Singh Dhillon (supra).* This was certainly misleading. There it went by way of a civil application whereas in Encl. 41 it borrowed an existing civil suit number and changed the parties thereto. It is interesting to note that in the case of the *Malaysian Bar v. Tan Sri Dato Abdul Hamid Omar* [1989] 2 MLJ 281 SC it went by way of a civil application using a different number with different parties.

In regard to costs that was sought for in Encl. 44 prayer (c), Mr. M. Pathmanathan submitted that that was entirely my discretion and he urged me to hold Mr. P.M. Mahalingam personally liable to pay the costs. The discretion to grant costs must be exercised judicially and according to the rules of reason and justice. It must not be motivated by private opinion (*Sharpe v. Wakefield* [1891] AC 173), nor benevolence (*Kierson v. Joseph L. Thompson & Sons Ltd.* [1913] 1 KB 587), nor sympathy (*Bevington v. Perks* [1925] 2 KB 231). The discretion to grant costs must, by necessity be justifiable (*Ritter v. Godfrey*

[1920] 2 KB 47). In my judgment, there are materials available in the present case for me to exercise that discretion in awarding costs to the successful party, namely the plaintiffs in Encl. 44 (*Civil Service Cooperative Society v. General Steam Navigation Co.* [1903] 2 KB 756 CA) without having to hear fresh *viva voce* evidence for the purpose of determining costs (*Mayor of Bristol v. G.W. Ry.* [1916] WN 47). In arguing that Mr. P.M. Mahalingam should be ordered to pay the costs personally, Mr. Yusof Khan referred me to the decision of the then Supreme Court in the case of *Karpal Singh v. Atip bin Ali* [1987] 1 MLJ 291 where Seah SCJ (as he then said) in a short judgment observed that:

> The first thing to remember is that an advocate and solicitor is an officer of the Court and that his professional conduct is always under the supervision and scrutiny of the Court. It follows that when there is derelection of duty on the part of an advocate and solicitor in the conduct of his professional work the Court may, in a proper case, order him to be personally liable for the costs of the proceedings after giving him an opportunity to defend himself.
>
> In the High Court below, after the learned Judge had struck out the civil suit, Karpal Singh (2nd defendant), appearing in person applied for the costs of the action to be borne by Karam Singh, learned Counsel for the plaintiff, personally. The learned Judge declined to make such an order. On appeal, Karpal Singh argued that the learned Judge had failed to exercise his discretion judicially. It was submitted that after finding the civil suit brought by the plaintiff to be 'conspicuously unmaintainable' and in the absence of any explanation given by Karam Singh, the learned Judge should have acceded to the application. We think the learned Judge had misconstrued the principle laid down by the House of Lords in *Myers v. Elman* [1940] AC 282 explained by Sachs J in *Edwards v. Edwards* [1958] P. 235 and followed by the then Court of Appeal in the case of *Mitra & Co. v. Thevar & Anor.* [1960] MLJ 79. In our opinion, having come to the conclusion that the civil suit filed by the plaintiff was 'conspicuously unmaintainable' and having rejected the explanation given by Karam Singh, we think that this was a proper case where the learned Judge ought to have exercised his discretion and ordered that the costs of the proceedings be paid by Karam Singh, the lawyer, personally. We therefore allow the appeal and amend the order of the learned Judge by adding the words that 'Karam Singh, do repay to the plaintiff, costs which the plaintiff has been ordered to pay to Karpal Singh, the 2nd defendant, under O. 59 r. 8 (2)(b) of the Rules of the High Court, 1980.' Costs of the appeal to the appellant to be paid by Karam Singh personally. Deposit to be refunded to the appellant.

It seems that the rationale for ordering the solicitor to pay personally the costs incurred therein was "not to punish the solicitor but to protect and compensate the opposite party" (per Sachs J in *Edwards v. Edwards* [1958] p. 235 especially at p. 247 of the report).

Mr. Yusof Khan argued forcefully that Mr. P.M. Mahalingam should be made to bear the costs personally as there was dereliction of duty on his part. Mr. Yusof Khan rightly pointed out that Mr. P.M. Mahalingam had admitted his mistake in filing Encl. 41. That mistake was said to be so fundamental that it became conspicuously unmaintainable to allow Encl. 41 to exist. This was said to be the dereliction of duty on the part of Mr. P.M. Mahalingam for which he must pay.

Mr. P.M. Mahalingam knew that he was going on an uphill task. He submitted that he was the senior Counsel while Messrs Gana Muthusamy & Co., remained on record as the solicitors for the defendants in Encl. 44. But unfortunately the assertion that he was the senior Counsel was not supported by Mr. Jayabalan from Messrs Gana Muthusamy & Co. Indeed if what Mr. P.M. Mahalingam said was true, Encl. 41 could and should be filed by Messrs Gana Muthusamy & Co. It is ironical that Mr. Jayabalan disclaimed connection with not only Encl. 41 but also Encl. 50. What is more surprising was this. Mr. P.M. Mahalingam admitted that he fell in error and that it was entirely his mistake when he filed Encl. 41 in the way he did. Mr. P.M. Mahalingam submitted that he had served enclosure 41 but this was challenged by Mr. Gan Techiong who said that he paid a praecipe of RM35 to obtain Encl. 41 from the Court. Notwithstanding his own mistake in filing Encl. 41, Mr. P.M. Mahalingam had the audacity to ask this Court to order that costs be incurred by Mr. M. Pathmanathan, Mr. Gan Techiong, M. Sakamoto and Makoto Togase.

An affidavit of Mr. P.M. Mahalingam in Encl. 49 in support of Encl. 50 particularly at para. 6 thereof blamed the Court staff for the error in numbering Encl. 41 as civil suit no: 22-257-1996. Mr. P.M. Mahalingam submitted that para. 6 was in error and he was apologetic about it. In fact in para. 10 of Encl. 49, Mr. P.M. Mahalingam tried to convey an apology worded in poor Bahasa Malaysia. It was worded this way:

> Saya berdukacita kerana sebab-sebab yang tidak disengajakan kepada Mahkamah Yang Mulia ini.

But on record para. 6 of Encl. 49 remained as solemn testimony of the blame levelled at the Court staff. Mr. P.M. Mahalingam did not seek to amend the offending paragraph by filing a corrective affidavit. It is a sad day for the judiciary if Counsel comes to Court and blames the Court staff for Counsel's own mistake. A mistake by Counsel be it intentional or otherwise, be it in regard to imprecise drafting or otherwise must be shouldered by the Counsel alone. It is pointless to shift the blame to others. Having admitted the mistake, Mr. P.M. Mahalingam submitted that this Court could convert Encl. 41 to an originating motion. This prompted Mr. M. Pathmanathan to argue that this

Court ought not to reward Mr. P.M. Mahalingam for his mistake. I agree entirely with this submission.

For the reasons adumbrated above, I granted the prayers sought for in Encl. 44 especially prayers (a) and (c). I felt that Dato Wong Gek Meng should pay the costs, on a full indemnity basis, to the plaintiffs, namely Yukilon Manufacturing Sdn. Bhd. and Yukigaya Chemical Industries Co. Ltd. It was for this reason that prayer (c) of Encl. 44 was acceded to.

Before proceeding to hear Encl. 50, I had another matter to consider in open Court. That was Civil Suit no: 22-224-1993 between Setialand Realty Sdn. Bhd. as the plaintiff and Tou Yeou Mou and Another as the defendants. Having disposed of that matter, I proceeded to hear Encl. 50. I directed that Encl. 50 be served on Messrs Gan & Lim. This was duly complied with. All parties agreed that though Encl. 50 was scheduled to be heard in chambers, it should instead be heard in open Court. On this concession, I ordered Encl. 50 to be heard in open Court. Mr. Yusoff Khan proceeded to submit and he informed the Court that since Mr. P.M. Mahalingam refused to withdraw Encl. 50 he would put Mr. P.M. Mahalingam on advance notice that the Court will be moved to order Mr. P.M. Mahalingam to pay the costs in the event Encl. 50 was dismissed with costs. Mr. Yusoff Khan rightly pointed out that Encl. 50 was conspicuously unmaintainable. He argued that the title to Encl. 50 was in error. The title still recited Civil Suit No: 22-257-1996 and the parties thereto were listed as the same parties as in Encl. 41. However my attention was drawn to an absence of the initial "JP" after the name of Dato Wong Gek Meng in Encl. 50 as compared to Encl. 41. Just like Encl. 41, Encl. 50 was filed by Messrs P.M. Mahalingam & Co. – the solicitor that was not on record. He submitted that on these grounds, Encl. 50 should be dismissed with costs. On hearing the submissions advanced by Mr. Yusof Khan, Mr. P.M. Mahalingam quickly withdrew Encl. 50. Since Mr. Yusof Khan decided not to press for costs, I ordered Encl. 50 to be struck out without costs. In an unprecedented move, Mr. P.M. Mahalingam has filed an appeal against my order in striking out Encl. 50 without costs notwithstanding the fact that he had withdrawn Encl. 50.

Reported by Ling Hea Hoon